IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 645 of 1991

Shri Sakharam Shankar Jondhale ... Appellant
(Orig.Plff)

V/s

1. Shri Madhukar Murlidhar Jondhale
2. Smt. Bhagubai Murlidhar Jondhale
(Appeal stands dismissed by Court's
order dated 5-3-1993)
3. Sou.Venubai Pandurang Sonawane .. Respondents
(Orig.Defts)

Shri Haridas i/b P.N.Joshi for Appellant
Shri S.M.Gorwadkar for Respondents

CORAM:S.R.SATHE,J.
DATED:22nd August 2006

ORAL JUDGMENT :-

1. The Appellant original plaintiff in Regular Civil Suit NO.229 of 1982 has preferred this appeal against the judgment and order passed by the Court of District

Judge, Nasik in Civil Appeal No.7 of 1984 whereby the judgment and order passed by the learned Civil Judge, J.D, Dindosi dismissing the plaintiff's suit for specific performance was confirmed and the appeal was dismissed. For the sake of convenience hereinafter the parties shall be referred to as the plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under:-

. The suit lands bearing block no.74 and 92 admeasuring in all 1 Hector 87 Ares described in detail in para 1 of the plaint were owned and possessed by deceased Murlidhar Devram Jondhale. The defendant nos.1 and 3 in the present suit are son and daughter of deceased Murlidhar while defendant no.2 is the wife of Murlidhar. According to the plaintiff on 11-12-1975 Murlidhar executed an agreement to sell in favour of the plaintiff and agreed to sell the suit lands to him for Rs.1350/- by accepting amount of Rs.1250/- as an earnest money. In the agreement to sell it was mentioned that Murlidhar would obtain necessary permission for sale of the land from the concerned authorities and the sale deed will be executed within one month from obtaining the possession. However, after the execution of the said agreement to sell and before obtaining necessary permission, Murlidhar died within a period of 1 or 1 1/2 months from

the date of agreement to sale.

3. It is plaintiffs' case that the defendants were aware of the agreement to sell executed by deceased Murlidhar he therefore asked the defendants to complete the transaction under the agreement to sell. Initially defendants promised that they would complete the transaction. However, subsequently they changed their stand. Hence plaintiff's issued notice dated 13-12-1979 to the defendants and called upon them to execute the sale deed of the suit lands. The defendants gave reply to the said notice and refused to execute the sale deed. Hence on 20-2-1981 plaintiff filed suit for specific performance of an agreement to sell against the defendants.

4. The defendant nos.1 to 3 filed their written statement at Exh.14 and opposed the suit claim. They contended that the lands in question are ancestral properties of defendants. During the old age of Murlidhar he was residing with defendant no.1 and he was looking after Murlidhar. Murlidhar was getting pension of Rs.49-50 ps and was not in need of money. According to defendants there was no need for Murlidhar to sell the ancestral lands.

5. The defendants further contended that taking undue

advantage of the fact that Murlidhar was of old age and was addicted to vices. The plaintiff by deceiving Murlidhar got the sale deed executed and as such the same is illegal. The defendants further contended that as per market price the suit land is of Rs.15,000/- or so and the consideration mentioned in the agreement to sell is grossly inadequate and from this also it can be seen that the agreement to sell was got executed by taking undue advantage. The defendants also contended that Murlidhar had never informed them about the execution of the alleged agreement to sell and the said agreement is illegal and void and the defendants are not liable to execute the said deed as alleged.

6. The defendants further contended that plaintiff was not put in possession under the agreement to sell. However, the plaintiff unauthorizedly obtained the possession and started taking income of the suit land. Not only that, but by joining hands with Talathi, plaintiff got his name entered in the record of rights. The defendants therefore contended that the suit agreement is in not legal and correct and the same is false. They, therefore, prayed for the dismissal of the suit.

7. On the above mentioned pleadings the learned trial Judge framed issues at Exh.15.

8. In order to prove the suit claim plaintiff examined himself at Exh.19 and witness Bhima Gaikwad Exh.2 and also produced certain documents including an agreement to sale. As against this the defendant no.1 examined himself at Exh.23. After considering the evidence on record the learned trial Judge came to the conclusion that the suit property is the ancestral property of defendants and there was no legal necessity for Murlidhar to sale the suit land. He also held that value of the suit property at the time of agreement to sell was more than Rs.15,000/-. He also held that plaintiff was not ready and willing to preform his part of the contract and defendants are not liable to execute the sale deed. Naturally, the learned trial Judge dismissed the plaintiff's suit.

9. Being aggrieved by the above mentioned order the original plaintiff filed Regular Civil Appeal No.7 of 1984. The same also came to be dismissed. Hence the plaintiff filed the present second appeal.

10. While admitting the appeal this Court (Coram: Ashok Agarwal,J.) has passed the following order :-

> Grounds 1 and 2 raise substantial question of law. Admit.

. The said grounds are as under :-

1. Whether the Courts below were justified in refusing the decree for specific performance on the ground of inadequacy of consideration?

2. Whether the Courts below were justified in coming to the conclusion of inadequacy of price, without there being any legal evidence in respect of the price of the land in the village where the lands are situated?

11. In this appeal before me the leaned Advocate for the plaintiff has urged three points. Firstly, he submitted that both the Courts below have not properly appreciated the evidence on record and wrongly held that there was no legal necessity to execute the agreement to sell. Secondly, he canvased before me that the courts below wrongly held that at the relevant time the market price of the suit land was about Rs.15,000/- and the consideration mentioned in the agreement is grossly inadequate. Lastly, he submitted that even if it is considered that suit land was the ancestral land still deceased Murlidhar had right to sell the said land, he being the KARTA of the family and in any case he was entitled to enter into an agreement to sell in respect of his undivided share in the suit lands. It was therefore, submitted that the courts below ought to have granted decree for specific performance atleast to the

extent of Murlidhar's share. The learned Advocate for the Appellant original plaintiff also submitted that when the courts below refused to pass decree for specific performance they ought to have directed the defendants to return the amount of Rs.1250/- to the plaintiff. He therefore, submitted that the appeal be allowed and the decree for specific performance be passed in favour of the plaintiff.

12. As against this Shri Gorwadkar, learned Advocate for the defendants supported the judgment and order passed by the courts below. He submitted that the suit agreement was executed by taking undue advantage of Murlidhar's condition and the amount mentioned in the agreement is grossly inadequate. Secondly, he canvassed before me that suit in the present form is not maintainable and plaintiff ought to have claimed partition and separate possession of Murlidhar's share along with decree for specific performance of the agreement to the extent of Murlidhar's share but that has not happened. He, therefore, submitted that no substantial question of law in fact is involved in the matter and second appeal be dismissed.

13. It is admitted fact that the agreement to sell in question dated 11-12-1975 Exh.20 is executed not by the present defendants but by deceased Murlidhar i.e. father of defendant nos.1 and 3 and husband of defendant

no.2. It is defendants' case that the suit property was ancestral property. Though in the plaint plaintiff has stated that the suit property was the property owned only by their deceased father Murlidhar, it is not correct. In fact, if we read the agreement to sell Exh.20 then we find that even in the said agreement it is clearly mentioned that the suit property is an ancestral property of the executant i.e. deceased Murlidhar. Besides this even in the cross examination of the plaintiff Exh.19 he has clearly admitted that the suit property is the ancestral property of Murlidhar. So, I have no hesitation to hold that the suit property in question is the ancestral property of deceased Murlidhar.

14. It is the contention of the defendants that Murlidhar alone had no right to execute an agreement to sell in respect of the suit property. It is pertinent to note that if we read the agreement to sell Exh.20 it is nowhere specifically mentioned therein that the said agreement has been executed by Murlidhar in his capacity as Karta or manager of the joint family. Not it is anywhere stated that other coparceners have given their consent for sale of the said property. Naturally, the question arises whether the deceased Murlidhar alone had a right to enter into such an agreement and to agree to alienate the suit property.

15. If we take into consideration the clause 255 of Mulla's Hindu Law which says:-

> 255. The following persons alone have power to alienate coparcenary property so as to pass a good title to the alienate -
>
> (1) the whole body of coparceners, where they are adults,
>
> (2) the manager, to the extent mentioned in
>
> (3) the father, to the extent mentioned in
>
> (4) a sole surviving coparcener in the circumstances mentioned in.

. No other coparcener is entitled to alienate coparcenary property so as to bind the other coparcener unless he is authorised by them to do so.

16. So, there is nothing on record to indicate that the property in question has been agreed to be sold by Murlidhar in his capacity as a manager or even in his capacity as father of defendant nos.1 and 3.

17. It is the contention of the defendants that deceased Murlidhar was addicted to vices and when the

alleged agreement to sell was executed he was of old age and taking undue advantage of the same the plaintiff got the agreement to sell executed. From the material on record it must be said that the defendants have not adduced any cogent and convincing evidence to show that Murlidhar was the addicted to vices. However, there are some other circumstances which may perhaps indicate that decease Murlidhar may not be aware of what he was exactly doing. While considering this aspect we must take into consideration the fact that land admeasuring over 3 Acres was agreed to be sold only for the amount of Rs.1350/-. The defendants have taken specific stand that at the relevant time the price of the land was much more than the consideration mentioned in the said agreement to sell and the consideration mentioned is grossly inadequate. It is true that mere gross inadequate consideration by itself is not sufficient to hold that the agreement in question is not legal and valid. But it is certainly a circumstance which may indicate that normally a prudent person would not agree for such transaction particularly when price offered is grossly inadequate.

18. The learned Advocate for the Appellant original plaintiff strenuously argued before me that in the instant case there is in fact no evidence to show as to what was the exact price of the land at village Javulke-dindori. It has come in evidence that price of

the lands at Palkhed is about Rs.5,000/- per Acre at present. However, at the same time it has also come in the evidence of plaintiff's witness Bhika Gaikwad that Government awarded compensation at the rate of Rs.6,000/- per acre to the land holders whose land was acquired for Dam in the year 1975. Those lands were also from village Palkhed. It has also come on record that distance between Javulke-dindori and Palkhed is about 8-9 miles. The learned Advocate therefore submitted that the said evidence cannot be taken into consideration while determining the price of the lands at village Javulke-dindori. However, it must be noted that the land in question is not a baron land. From 7x12 extracts which are on record at Exh.27 it can be seen that the land in question is Jirayat land and some crop is being taken in the same. So, it is very difficult to believe that the price of the such land would be hardly Rs.400/- per Acre. I therefore feel that both the courts below have rightly held that the consideration mentioned in the agreement in question is grossly inadequate.

19. Once it is held that deceased Murlidhar had in fact no right to enter into an agreement to sell in respect of the suit land then plaintiff is certainly not entitled for the specific performance of the agreement executed by deceased Murlidhar. It was argued on behalf of the Appellant plaintiff that specific performance

atleast to the extent of Murlidhar's share in the suit land be granted. In order to substantiate this proposition he has placed reliance on a case **A.Abdul Rashid Khan (dead) and Ors. V/s P.A.K.A. Shahul Hamid and Ors. 2001(3) ALL MR 770** wherein Their Lordships of the Supreme Court have observed that even where any property is held jointly and one of the party has agreed to sell such joint property by an agreement then, even if other co-sharers are not joined, atleast to the extent of his share, who executed the agreement is bound to execute the sale deed. This proposition is not disputed by other side also, and same cannot be disputed. However, it must be noted that facts of the above mentioned reported ruling and facts of the case in our hand are quite different. In the above mentioned case the plaintiff who had filed a suit for specific performance had specifically averred that executant of the agreement had agreed that he would obtain the consent of other sharers. However, in the instant case it is not so. The defendant is a distant relation of deceased Murlidhar. So, he was aware that the lands in question is in fact not exclusively owned by Murlidhar but it is coparcenary property in which the defendants also having right. So, under such circumstances plaintiff should have insisted that the agreement should be executed by all or their signatures be obtained as consenting party, particularly when we find that deceased Murlidhar had not executed the agreement in his

capacity as Karta or manager of the joint family. There is another factor which distinguishes the present case from the above mentioned ruling. In that case admittedly suit for specific performance was filed only in respect of share who had executed the agreement and at the same time plaintiff had prayed for partition and separate possession. However, in the instant case it is not so. Thus, in view of this position I have no hesitation to hold that the ratio of the above mentioned ruling is not applicable to the facts of the present case and the said ruling is of no help to the plaintiff.

20. Incidently, it must also be noted here that there is nothing in the agreement or in evidence of the plaintiff which would go to show that Murlidhar had agreed to sell the property for legal necessity as contemplated under clause 242 of the Mulla's Hindu Law. So, looking the case from any angle it is very clear that the deceased Murlidhar alone had no right to enter into an agreement to sell Exh.20. Naturally, plaintiff is not entitled to get specific performance of the said agreement from the defendants who are admittedly having share in the suit property.

21. The learned advocate for the Appellant plaintiff submitted that court below have erred in not directing the defendant to return the earnest money. However, while considering this submission one has to take into

consideration the provisions of Section 22 of the Specific Relief Act, 1963, which runs as follows :-

> 22. Power to grant relief for possession, partition, refund of earnest money, etc. (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for -
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> (a) possession, or partition and separate possession of the property,in addition to such performance; or
>
> b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.
>
> (2) No relief under Cl.(a) or Cl.(b) of sub-section (1) shall be granted by the Court, unless it has been specifically claimed;

. Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms, as may be just for including a claim for such relief.

(3) The power of the Court to grant relief, under cl (b) of sub-section (1) shall be without prejudice to its powers to award compensation under S. 21.

22. In the instant case admittedly plaintiff had not specifically claimed the refund of earnest money. Not only that but it is pertinent to note that even thereafter at no stage plaintiffs sought amendment to that effect. When such is the position it must be held that courts below were right in not passing any decree directing the defendants to refuse the earnest money. Besides this, it smut also be noted here that this is in fact a case where the defendants have not actually received the amount of earnest money. They have in fact come out with a case that they had no knowledge of the agreement in question and deceased Murlidhar was addicted to vices and taking advantage of the same the plaintiff got the agreement executed. So, taking into consideration all these facts and circumstances, I have no hesitation to hold that both the courts below have rightly dismissed the plaintiff’s suit. There is no

reason to interfere with the said finding.

22. In this view of the matter there is no substance in the appeal. The appeal is dismissed.

(S.R.SATHE,J.)